

STATE OF MICHIGAN
COURT OF APPEALS

HELEN TRAKUL,

Plaintiff-Appellant/Cross-Appellee,

v

PAUL A. TRAKUL REVOCABLE TRUST and
SANDRA WOODRUFF,

Defendants-Appellees/Cross-
Appellants,

and

ESTATE OF PAUL A. TRAKUL,

Defendant.

UNPUBLISHED

September 18, 2008

No. 279346

Oakland Probate Court

LC No. 2006-306007-CZ

Before: Whitbeck, P.J., and Bandstra and Donofrio, JJ.

PER CURIAM.

Plaintiff Helen Trakul appeals as of right from an opinion of the probate court that granted summary disposition to defendants on her claims for conversion of funds that occurred in 2003 and before. Defendants Paul A. Trakul Revocable Trust and Sandra Woodruff cross-appeal from the same order, arguing that the trial court erred in denying them summary disposition on Helen Trakul's claims that arose in 2004. We reverse and remand. We decide this appeal without oral argument.¹

I. Basic Facts And Procedural History

Helen Trakul filed a complaint against defendants Estate of Paul A. Trakul, deceased, and Sandra Woodruff individually and as successor trustee of the Paul A. Trakul Revocable Trust.²

¹ MCR 7.214(E).

² A probate estate was not opened and so references to "defendants" in this opinion are to appellee/cross-appellants Sandra Woodruff individually and as successor trustee of the Paul A. Trakul Revocable Trust.

Paul Trakul was Helen Trakul's son who died on July 26, 2005. At the time of his death, Paul Trakul was engaged to defendant Sandra Woodruff. Woodruff is the successor trustee of the Paul A. Trakul Revocable Trust and personal representative under the Last Will and Testament of Paul A. Trakul. Woodruff is also the primary beneficiary under the terms of both documents.

Helen Trakul alleged that in anticipation of surgery, in or around 2000, she gave Paul Trakul signatory authority of certain of her investment accounts for the purpose of permitting Paul Trakul to administer her financial affairs during her temporary incapacity. Helen Trakul stated that she did not authorize Paul Trakul to withdraw any of the funds in the accounts for his personal use.

The parties do not dispute that Helen Trakul's claims are for the conversion of funds from the accounts. Helen Trakul claims that on ten separate occasions between July 2000 and October 2004, Paul Trakul wrongfully withdrew funds in the amount of \$153,933.05, without her permission, for his personal use. Seven of the withdrawals, totaling \$147,971.67, occurred prior to February 2003. The remaining three withdrawals occurred during 2004, in the total amount of \$5,961.38. The dates and amounts of the withdrawals are not disputed.

Defendants answered the complaint and shortly thereafter filed a motion for summary disposition pursuant to MCR 2.116(C)(7), asking the trial court to dismiss Helen Trakul's claims with regard to the first seven withdrawals because they accrued more than three years before Helen Trakul filed the complaint and, thus, were barred by the statute of limitations. Defendants also argued that the remaining three withdrawals were barred because Helen Trakul failed to respond to defendants' disallowance of claims within the statutorily required 63 days to file a lawsuit pursuant to MCL 700.7507(a).³

Based on the briefs submitted by the parties, the trial court determined that Helen Trakul's claims were for "the wrongful taking of property of another" and subject to the three-year period of limitations set forth in MCL 600.5805(10). On that basis, the trial court decided that Helen Trakul's claims regarding the first seven withdrawals, having occurred more than three years before the complaint was filed, were time-barred.

Regarding the remaining withdrawals, the trial court held they were not barred because defendants' notice of disallowance failed to warn of the bar to claims brought after 63 days:

³ As noted, Paul Trakul died in July 2005. In September 2005, Woodruff published notice to creditors of the Paul A. Trakul Revocable Trust in her capacity as successor trustee of the Trust. On January 6, 2006, Helen Trakul's counsel wrote to Woodruff making the claims upon which this action is based. On January 17, 2006, counsel for Woodruff responded by letter:

Sandra, as Trustee of Paul's Trust as well as a beneficiary of any property that she might have received from Paul will not agree to any reimbursements of amounts which may still be in his Trust, or amount she may have receive [sic] as his beneficiary. Sandra is ready and willing and able to defend any legal action that you and your client might be inclined to bring regarding this matter.

Helen Trakul filed the complaint on August 29, 2006, 102 days later.

Pursuant to MCL 700.7502(a), the Defendant is required to notice of disallowance [sic] to the Plaintiff. The notice requires the Defendant to inform the Plaintiff that unless the suit is brought within 63 days, the claim will be forever barred. This Court is of the opinion that the disallowance letter sent to the Plaintiff does not meet the statutory required language; therefore, the claims presented by the Plaintiff that were not barred by the statute of limitations cannot be considered barred because the 63 day required notice was not properly provided.

The trial court did not hear or decide facts regarding whether the withdrawals at issue were authorized or gifts.

It is from the trial court's grant of summary disposition as to the first seven withdrawals that Helen Trakul now appeals. Defendants cross-appeal from the trial court's denial of summary disposition on the claims concerning the remaining withdrawals.

II. Determining The Applicable Statute Of Limitations

A. Standard Of Review

Helen Trakul argues that the period of limitations for her claims is six years, as established by MCL 600.5813, and that the trial court erred by applying the three-year period of limitations set forth in MCL 600.5805(10). The question of whether a claim is barred by a statute of limitations is a question of law that this Court reviews de novo.⁴ Also, motions for summary disposition are reviewed de novo.⁵

B. Analysis

At issue in this case is whether the limitations period applicable to claims for the conversion of funds is the three-year period in MCL 600.5805(10) for "all other actions to recover damages for the death of a person, or for injury to a person or property[.]" or the six-year period in MCL 600.5813 for "[a]ll other personal actions" not otherwise specified.

This Court in *Tillman v Great Lakes Truck Ctr, Inc.*,⁶ recognizing that precedent was inconsistent, recently resolved this issue, holding the three-year period to be applicable. In doing so, the *Tillman* Court relied on *Janiszewski v Behrmann*,⁷ in which the Michigan Supreme Court stated that an action for conversion of property was barred by the statute of limitations for injury to person or property. The *Tillman* Court noted that the statute referenced in *Janiszewski* was, in relevant part, the predecessor statute to MCL 600.5805(10).⁸ Thus, this Court determined that

⁴ *Scherer v Hellstrom*, 270 Mich App 458, 461; 716 NW2d 307 (2006).

⁵ *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

⁶ *Tillman v Great Lakes Truck Ctr, Inc.*, 277 Mich App 47, 50; 742 NW2d 622 (2007).

⁷ *Janiszewski v Behrmann*, 345 Mich 8, 32; 75 NW2d 77 (1956).

⁸ *Tillman*, *supra* at 50.

Janiszewski was controlling and that an action for conversion is an action to recover damages for injury to property subject to the three-year period of limitations of MCL 600.5805(10).⁹ Accordingly, we conclude that trial court properly concluded that Helen Trakul's claims were subject to the three-year period of limitations that MCL 600.5805(10) sets forth.

III. Applying The Statute Of Limitations

A. Standard Of Review

Helen Trakul argues that even if the three-year period of limitations applies, defendants fraudulently concealed her claims and she did not discover them until some time after they accrued. Therefore, Helen Trakul argues that MCL 600.5855 should apply and that all of the disputed withdrawals were within the statute of limitations at the time she filed the complaint.

Helen Trakul did not raise this issue below and did not preserve it for appellate review. Instead she argued that MCL 600.5813 was the applicable statute of limitation. Further, the trial court did not address this issue. But "this Court may overlook preservation requirements if the failure to consider the issue would result in manifest injustice, if consideration is necessary for a proper determination of the case, or if the issue involves a question of law and the facts necessary for its resolution have been presented."¹⁰ Accordingly, the fact that Helen Trakul may not have fully briefed and argued this issue in her lower court pleadings, or that she now cites authority that the trial court did not consider, does not preclude her from raising the issue on appeal. Because consideration of this matter is necessary for a proper determination of the case and involves a question of law, the resolution of which may be determined on the facts presented, this Court shall overlook lack of preservation and consider the issue.

B. Analysis

Specifically, MCL 600.5855 establishes that:

if a person who is or may be liable for any claim fraudulently conceals the existence of the claim or the identity of any person who is liable for the claim from the knowledge of the person entitled to sue on the claim, then the action may be commenced at any time within two years after the person who is entitled to bring the action discovers, or should have discovered, the existence of the claim or the identity of the person who is liable for the claim, although the action would otherwise be barred by the period of limitations.

Under the fraudulent concealment statute, which provides generally that the limitation period is tolled when a party conceals the fact that the plaintiff has a cause of action, the plaintiff must plead the acts or misrepresentations that comprised the fraudulent concealment and must prove that the defendant committed affirmative acts of misrepresentation that were designed to

⁹ *Id.*

¹⁰ *Smith v Foerster-Bolser Constr, Inc*, 269 Mich App 424, 427; 711 NW2d 421 (2006).

prevent subsequent discovery.¹¹ Fraudulent concealment occurs when a defendant uses an artifice with the intent to prevent inquiry or avoid investigation, and to mislead or hinder discovery of information that would provide notice of a cause of action.¹² Finally, the plaintiff must show that defendant concealed the existence of a claim or the identity of the actor.¹³

The record supports Helen Trakul's claim that the withdrawals at issue were fraudulently concealed and that Helen Trakul brought her action with regard to all of the withdrawals within the two-year period established in MCL 600.5855. First, Helen Trakul alleged facts showing that Paul Trakul was her fiduciary. Helen Trakul stated that she added Paul Trakul to her accounts in anticipation of her temporary incapacity and did not authorize him to withdraw funds for his personal use. As between persons sustaining a fiduciary or other confidential relationship toward each other, the person occupying the relation of fiduciary is under a duty to reveal facts to the plaintiff. Further, his silence when he ought to speak, or his failure to disclose what he ought to disclose, is as much a fraud as an actual affirmative false representation.¹⁴ In other words, the fiduciary's silence as to a cause of action amounts to fraudulent concealment.¹⁵

In addition, Helen Trakul alleged additional factual issues surrounding the fraudulent concealment of her claims by defendants. Helen Trakul stated that she was 77 years old, legally blind, did not have the ability to read her bank statements, and relied on Paul Trakul's honesty in assisting her with her affairs. Helen Trakul further alleged that Paul Trakul diverted the delivery of Helen Trakul's bank statements to his home and that she was unaware the withdrawals were being made. Therefore, Helen Trakul properly alleged that Paul Trakul used fraudulent actions to conceal the conversion of her funds.

In deciding a motion for summary disposition based on statute of limitations, a court should consider all affidavits, pleadings, and other documentary evidence submitted by the parties.¹⁶ If no facts are in dispute, the question of whether a claim is barred on statute of limitations grounds is a question of law, which may be decided on a motion for summary disposition.¹⁷ Here, the material issues of genuine fact regarding whether claims were fraudulently concealed precluded summary disposition against Helen Trakul on the ground that her action was barred by the statute of limitations.

¹¹ MCL 600.5855; *Phinney v Perlmutter*, 222 Mich App 513, 562; 564 NW2d 532 (1997).

¹² *Doe v Roman Catholic Archbishop*, 264 Mich App 632, 642; 692 NW2d 398 (2004).

¹³ *Id.* at 643.

¹⁴ See, e.g., *Barrett v Breault*, 275 Mich 482; 267 NW 544 (1936); *Allen v Conklin*, 112 Mich 74; 70 NW 339 (1897); *Tompkins v Hollister*, 60 Mich 470; 27 NW 651 (1886).

¹⁵ See *Lumber Village, Inc v Siegler*, 135 Mich App 685, 355 NW2d 654 (1984).

¹⁶ MCR 2.116(C)(7); *Holmes v Michigan Capital Medical Ctr*, 242 Mich App 703; 620 NW2d 319 (2000).

¹⁷ *Id.*

IV. Perfection Of Helen Trakul's Claims

A. Standard Of Review

On cross-appeal, defendants assert that Helen Trakul's claims based on the 2004 withdrawals are barred because she did not perfect them by bringing action within 63 days from defendants' notice of disallowance of claims as required by MCL 700.7507. Again, we review motions for summary disposition de novo.¹⁸ We also review questions of statutory construction de novo.¹⁹

B. Analysis

When no probate proceeding is open with respect to a decedent with a revocable trust, the trustee of the trust must give notice to creditors of the decedent in much the same manner required as a personal representative in a probate proceeding.²⁰ Further, MCL 700.7507 provides that the trustee may allow or disallow a claim. It also specifies that a claim is barred if it is not filed within 63 days and if the notice of disallowance specifically warns of the impending bar. Specifically, that provision provides in relevant part:

The trustee may deliver or mail a notice to the claimant stating that the claim has been disallowed in whole or in part. If, after allowing or disallowing a claim, the trustee changes a decision concerning the claim, the trustee shall notify the claimant. The trustee shall not change a decision disallowing a claim if the time for the claimant to commence a proceeding for allowance expires or if the time to commence a proceeding on the claim expires and the claim has been barred. A claim that is disallowed in whole or in part by the trustee is barred to the extent not allowed unless the claimant commences a proceeding against the trustee not later than 63 days after the mailing of the notice of disallowance or partial allowance if the notice warns the claimant of the impending bar. Failure by the trustee to deliver or mail to a claimant notice of action on the claim within 63 days after the time for the claim's presentation has expired constitutes a notice of allowance.^[21]

When the language of a statute is unambiguous, the Court gives the words their plain meaning and applies the statute as written.²² "The Legislature is presumed to have intended the meaning it has plainly expressed, and if the expressed language is clear, judicial construction is not permitted and the statute must be enforced as written."²³ MCL 700.7507 is straightforward,

¹⁸ *Maiden, supra* at 118.

¹⁹ *Perry v Golling Chrysler Plymouth Jeep, Inc*, 477 Mich 62, 65; 729 NW2d 500 (2007).

²⁰ MCL 700.7504.

²¹ MCL 700.7507(a).

²² *Rowland v Washtenaw Co Rd Comm'n*, 477 Mich 197, 202; 731 NW2d 41 (2007).

²³ *Robertson v DaimlerChrysler Corp*, 465 Mich 732, 748, 641 NW2d 567 (2002).

clear, unambiguous, and not constitutionally suspect. Accordingly, it should be enforced as written.

MCL 700.7507 requires that for the bar to apply, notice of that bar need be given as directed and that such notice is adequate if it specifically warns of the 63-day limitation to file a lawsuit and otherwise complies with the requirements of the statute. Defendants' letter advising Helen Trakul of the disallowance of her claims did not contain the warning of the impending bar. Therefore, the trial court correctly determined that the bar was not applicable.

We reverse and remand for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Richard A. Bandstra
/s/ Pat M. Donofrio